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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0422
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ROBERT PEREZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200501257

Honorable David M. Roer, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and David A. Sullivan — Tucson
Attorneys for Appellee

Mark F. Willimann — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 A jury found appellant Robert Perez guilty of ten counts of sexual misconduct and child abuse of his daughter A. and her friend C. After finding Perez previously had been convicted of a felony, the trial court sentenced him to five consecutive life sentences, each

without the possibility of release for thirty-five years, to be followed by concurrent prison terms, the longest of which was ten years. On appeal, Perez argues the trial court erred in admitting A.'s prior inconsistent statements, the state failed to present sufficient evidence of the date of the offense and of the offenses in general, and his trial counsel was ineffective. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Perez.[1] *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). In January 2003, A., then eleven years old, spent the night at her friend C.'s house. A. told C. that Perez had been sexually abusing her. C. then told A. about an incident that had occurred at school in which Perez had unbuttoned her pants and tried to touch her genitals. C. told her foster mother about the abuse, and the three of them discussed the abuse issues. The girls then called a child abuse hotline maintained by Child Protective Services (CPS).

¶3 A. told Lisa Anthony, a CPS employee who worked at the hotline, that Perez had been sexually molesting her for approximately the last three years, with the most recent

[1]Perez's opening brief does not comply with Rule 31.13(c)(1)(iv), Ariz. R. Crim. P., 17 A.R.S., which mandates that the statement of facts contain "appropriate references to the record." Because Perez's statement of facts contains no citation to the record, we have therefore disregarded his statement of facts, *see Flood Control District of Maricopa County v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985), and have instead relied on appellee's statement of facts and our review of the record.

incident occurring a couple of weeks previously. A. also reported Perez had engaged in other incidents of physical abuse of a nonsexual nature. Anthony filed a report to allow a CPS case manager in the field to follow up on the allegations.

¶4 A. met with Dawn Bridegroom, a CPS case manager, the next day in C.'s home. Bridegroom conducted a brief interview with A. in which A. told her that she and Perez "had sex in the back of [his] truck," that he had sexually abused her in their home and in a "shed storage area," and that he also had physically abused her. A. also told Bridegroom that, although she had once tried to tell her cousin about the abuse, C. was the first person she had told. Bridegroom contacted her unit supervisor who instructed her to contact the Pinal County Sheriff's Department.

¶5 After a detective arranged for a forensic interview and medical examination, Wendy Dutton, a certified professional counselor and forensic interviewer, conducted a videotaped interview of A. During the interview, A. said Perez had been molesting her for several years and the sexual abuse occurred as frequently as every week. She told Dutton about several incidents of oral and anal sexual contact that occurred in Perez's truck and said he had once shown her pornographic photographs while in the truck. A. also reported incidents of sexual contact that had occurred in Perez's bedroom and in a storage room next to their house. She further told Dutton about the first time Perez had molested her and about his physical and verbal abuse of her. A. repeated the allegations to Dr. Sudha Chandrasekhar, a pediatrician who conducted a medical examination of A.

¶6 A. was also referred by CPS to Donna Davis, a psychotherapist. A. reported abuse that had continued for years and told Davis about specific incidents. A. told Davis she had nightmares about Perez and worried that he would try to "kill [their] family." Davis and A. met about thirty-five times between January and November, during which A. never recanted her allegations.

¶7 Perez's first trial on these allegations resulted in a hung jury. In a subsequent indictment, he was charged with five counts of sexual conduct with a minor and one count each of attempted sexual conduct with a minor, attempted child molestation, furnishing obscene materials to a minor, and child abuse, all committed against A. He was also charged with one count of child molestation against C.

¶8 A. recanted her allegations, although she admitted she had made the assertions against Perez to numerous people, but said she had made them up because she was angry at him for always being away from home and C. had told her what to say. The state played the videotape of A.'s interview with Dutton for the jury and called Anthony, Bridegroom, Davis, and Chandrasekhar to testify generally about A.'s reports to them of prior abuse allegations. The state also presented evidence that A.'s mother would not believe her "until she got DNA [deoxyribonucleic acid] proof" and was attempting to reunify the family. Dutton testified generally about why a victim of abuse might recant allegations of abuse and testified that a lack of maternal support is one factor in recantations. C. testified and repeated her allegations that Perez had molested her. She also testified about the statements A. had made

to her in January 2003. The jury found Perez guilty on all counts against A. but found him guilty only of attempted child molestation against C. This appeal followed.

Discussion

Admissibility of Prior Inconsistent Statements

¶9 Perez contends the trial court erred in admitting A.'s prior inconsistent statements in violation of Rule 403, Ariz. R. Evid., 17A A.R.S. This rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id*. We review the court's evidentiary ruling for an abuse of discretion. *State v. Lacy*, 187 Ariz. 340, 348, 929 P.2d 1288, 1296 (1996).[2]

¶10 Prior inconsistent statements by a testifying witness are not considered hearsay under Rule 801(d)(1)(a), Ariz. R. Evid., 17A A.R.S.[3] "The rationale underlying this rule is that the jury should be allowed to hear the conflicting statements and decide 'which story

[2]The state argues that, although he "objected to the admission of the videotaped interview," Perez forfeited his right to appellate relief, absent fundamental error, because he did not object to Davis's testimony about A.'s prior inconsistent statements. Although Davis, as well as other witnesses, testified generally about A.'s prior inconsistent statements without objection, we note the videotape was the key piece of evidence that provided detail about each of Perez's offenses against A. and that Perez objected to its admission.

[3]Rule 801(d)(1)(a) provides that a statement is not hearsay when "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony."

represents the truth in the light of all the facts, such as the demeanor of the witness, the matter brought out on his direct and cross-examination, and the testimony of others.'" *State v. Miller*, 187 Ariz. 254, 257, 928 P.2d 678, 681 (App. 1996), *quoting State v. Moran*, 151 Ariz. 373, 375, 728 P.2d 243, 245 (App.1985), *aff'd in part and vacated in part on other grounds*, 151 Ariz. 378, 728 P.2d 248 (1986). Prior inconsistent statements can be used both substantively and for impeachment. *State v. Acree*, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978); *State v. Mills*, 196 Ariz. 269, ¶ 21, 995 P.2d 705, 710 (App. 1999).

¶11 Perez argues A.'s prior inconsistent statements were inadmissible under Rule 403 based on *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982), and *State v. Cruz*, 128 Ariz. 538, 627 P.2d 689 (1981). In *Cruz*, the defendant allegedly told his sister that he planned to shoot the eventual victim, who then related the statement to the victim's girlfriend. 128 Ariz. at 539-40, 627 P.2d at 690-91. After the sister denied the defendant had made the statement, the victim's girlfriend, a state's witness, testified the sister had made the statement. *Id*. Although the statement was not hearsay, our supreme court held the trial court should have precluded it under Rules 102[4] and 403, Ariz. R. Evid, based on a concern about "a swearing contest between the declarant and the person to whom the statement was allegedly made." 128 Ariz. at 540, 627 P.2d at 691. The court stated that, "[e]ven though

[4]Rule 102 provides that the "rules [of evidence] shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and the promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

an out-of-court statement may be used to cast doubt on a witness' credibility, when it contains the dual purpose of tending to prove a defendant's guilt, it should not be admitted." *Id.*

¶12 However, *Cruz* was later clarified in *Allred*, 134 Ariz. at 277, 655 P.2d at 1329, which established a five-factor admissibility test "when the impeaching testimony is used for substantive purposes":

> 1) the witness being impeached denies making the impeaching statement, and
>
> 2) the witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, or
>
> 3) there are other factors affecting the reliability of the impeaching witness, such as age or mental capacity,
>
> 4) the true purpose of the offer is substantive use of the statement rather than impeachment of the witness,
>
> 5) the impeachment testimony is the only evidence of guilt.

¶13 Perez argues that all five factors weighed against admission of A.'s prior statements. But A. did not deny making the impeaching statements, the first of the *Allred* factors; rather she asserted that she lied when she made them. It is when a witness denies making a statement that the *Cruz* concerns of a "swearing contest" are present. 128 Ariz. at 540, 627 P.2d at 691. And Perez misapplies the second and third factors in stating A. was an interested party and unreliable; the proper questions are whether the impeaching witness

was both interested and reliable. *See State v. Sucharew*, 205 Ariz. 16, ¶ 22, 66 P.3d 59, 67 (App. 2003) (interested party and reliability inquiry focuses on impeaching witness); *Miller*, 187 Ariz. at 258, 928 P.2d at 682 (same). There was no evidence that Anthony, Bridegroom, Davis, and Chandrasekhar were interested parties. *See id.* at 258, 928 P.2d at 682 (interested parties are those with "personal connection with the participants or personal stake in the case's outcome"). There is also nothing in the record that indicates these witnesses were unreliable. Indeed, having A.'s statements on videotape would appear to alleviate concerns that any witness's memory was incomplete. *See id.* (recording conversation eases reliability concerns). Perez correctly asserts, however, that "[t]he State unquestionably used [A.'s] 'prior inconsistent statement' as substantive proof of [his] guilt." And impeachment testimony was the sole evidence of Perez's guilt.

¶14 In a previous analysis approved by our supreme court, we upheld the admission of very similar prior inconsistent statements. *Moran*, 151 Ariz. at 374-76, 728 P.2d 244-46.[5] There,

> [t]he [victim's] complaint to authorities of sexual molestation by her father came to light after she went to her school principal, at the urging of her friend Lynette, and told him that her father had been having sexual contact with her since she was five years

[5]We note the supreme court reversed the defendant's conviction because improper expert opinion testimony had been admitted. *State v. Moran*, 151 Ariz. 378, 386, 728 P.2d 248, 256 (1986). However, the court approved our opinion in part, specifically agreeing that our analysis of whether "the prior inconsistent statements could be used as substantive evidence of the crime, even if they were the only evidence of the crime," was "well-reasoned." *Id*. at 380, 728 P.2d at 250.

> old. School officials, already in communication with authorities because of a similar complaint against defendant by Lynette, called in sheriff's deputies to investigate. The taped statement made to authorities at that time provided the basis for the arrest of and charges against the father.
>
> At trial, the daughter was the first prosecution witness. She recanted her accusations against her father under oath. She did not deny having made the accusations earlier and confirmed that she had told school authorities, two detectives, two therapists, her mother, her foster mother, her friend Lynette and Lynette's mother that her father had molested her. The state proceeded to bring on the school psychologist, who reported Lynette's accusations against appellant; the school counselor, to whom the daughter and Lynette related their stories; and the school principal to whom the daughter and Lynette had repeated the story of molestation earlier given to the counselor. Thus, three school professionals testified to the girls' complaint against the defendant. Two psychologists who had evaluated or were treating the daughter at the behest of Child Protective Services testified to her statements, as did two detectives. In addition, her tape-recorded statement to the detectives was played for the jury. No other evidence beyond the prior inconsistent statements was offered at trial to establish that a crime had been committed or that defendant had committed it.

Id. at 374-75, 728 P.2d at 244-45.

¶15 In *Moran*, we distinguished *Allred*, "where the alleged maker of the prior statement denied making it, where the prior statement was the only evidence that a crime had been committed, where there was no corroboration that the statement had been made, and where the maker of the statement was a very young child." 151 Ariz. at 376, 728 P.2d at 246. We explained that "[t]he witness did not deny making the statements. She was sixteen and quite clearly competent as a witness. The statements were amply corroborated; indeed, there

were many of them over a substantial period of time, unlike the single sentence involved in *Allred*." *Id*.

¶16 Other than the age of the victim, the facts in *Moran* suggest its reasoning is equally applicable here. A. was eleven when she first reported the abuse and gave the videotaped interview in January 2003. She was fourteen at the time of trial. Although younger than the victim in *Moran*, A. was significantly older than the victim in *Allred*, who was four when she allegedly made a single sentence statement to an investigator that implicated her mother. 134 Ariz. at 276, 655 P.2d at 1328. Like the victim in *Moran*, A. did not deny having made the statements. She mentioned the abuse to a number of people over a period of time, and those witnesses testified at trial about her statements. The videotaped interview corroborated that A. had made the allegations against Perez, possibly alleviating any concern that a single witness incorrectly remembered an isolated statement that occurred some time before trial. Therefore, we find *Moran*'s logic controlling and conclude the trial court did not abuse its discretion in admitting A.'s prior inconsistent statements. *See Lacy*, 187 Ariz. at 348, 929 P.2d at 1296.

Sufficiency of the Evidence - Dates of Crimes

¶17 Perez argues insufficient evidence supports the convictions because "the State failed to present any evidence that the event[s] happened 'reasonably near the date or dates alleged.'" "When reviewing whether sufficient evidence supports a criminal conviction, we determine if '*any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.'" *State v. Johnson*, 210 Ariz. 438, ¶ 5, 111 P.3d 1038, 1040 (App. 2005), *quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We will not disturb a conviction on a challenge to the sufficiency of the evidence unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). And, in assessing the sufficiency of the evidence, we view it in the light most favorable to sustaining the verdict. *Id*.

¶18 The trial court instructed the jury

> that the indictment charges were committed "on or about" certain dates. The proof need not establish with certainty the exact dates of an alleged offense. It is sufficient if the evidence in this case established beyond a reasonable doubt that the offenses were committed on a date reasonably near the date or dates alleged.

Perez does not challenge the accuracy of this instruction but simply argues there was no evidence "the events occurred 'on or about' the dates listed" in the indictment. (Emphasis removed.) *See State v. Berry*, 101 Ariz. 310, 314, 419 P.2d 337, 341 (1966) (in prosecution for sexual assault when young victim "somewhat unsure of the time of the assault," inconsistency went to credibility of witness but was not "fatal variance" between indictment and trial evidence).

¶19 Counts I, II, and III of the indictment alleged incidents occurring "[s]ometime in late December 2002." A.'s interview with Dutton occurred in mid-January 2003. A. stated she was in fifth grade at the time of the interview. She said during that school year,

after Christmas, but while still on Christmas vacation from school, her father had committed the assaults alleged in counts I-III. This testimony corresponded with the "late December 2002" date charged in the indictment.

¶20 Count IV alleged an incident occurring "between April 2001 and March 2002." In the videotaped interview, A. stated she was ten years old when the incident occurred. As A. stated she was eleven during the interview in January 2003 and would turn twelve in April of that year, she would have been ten years old between April 2001 and April 2002, reasonably near the date alleged in the indictment.

¶21 Count V charged Perez with an incident occurring "between November 15, 2002 and December 25, 2002." A. described the incident in the interview with Dutton and stated it had taken place when she was in fifth grade, before Christmas, but after Thanksgiving, which corresponded with the dates alleged in the indictment.

¶22 Count VI alleged an incident occurring "between November 1, 2002 and December 31, 2002." During the mid-January interview, A. stated the sexual contact happened about a month earlier, but also that it had occurred after Christmas but while she was still on school vacation. Again, this was reasonably near the date alleged.

¶23 Count VII charged Perez with an incident that occurred "between June 13, 1998 and May 24, 2000." A. stated she was in second grade when this abuse occurred. She also said she had to repeat second grade and was unsure whether the incident occurred during the first or second time she was in second grade. As A. was in fifth grade in January 2003,

she would have been in second grade from late summer or early fall 1998 to late spring or early summer 2000, again corresponding with the dates alleged in the indictment.

¶24 Count VIII alleged events occurring "between December 1, 2002 and January 11, 2003." A. stated in January that the event occurred when she was in fifth grade, after Christmas, which corresponded with the date alleged in the indictment.

¶25 Count IX charged Perez with child abuse occurring "between June 13, 1998 and January 11, 2003." All the conduct A. alleged occurred between these dates.

¶26 Count X charged Perez with child molestation of C. "between August 2000 and June 2001." C. was in eighth grade during the trial in September 2005. Although she initially testified she was unsure when the molestation had occurred, she admitted she had previously testified the incident had occurred while she was in third grade. She also later agreed that Perez had "ask[ed] her to go somewhere that day in either third or fourth grade after lunch." And A. stated during her videotaped interview that C. had told her Perez had molested her when she was in third grade. C. would have been in third grade from late summer or early fall 2000 to late spring or early summer 2001 and in fourth grade the following year.

¶27 Although the evidence of the date of the occurrence of the act C. alleged was moderately inconsistent and did not correspond precisely with the dates charged in the indictment, this inconsistency relates to credibility rather than sufficiency of the evidence. *See Berry*, 101 Ariz. at 314, 419 P.2d at 341. Moreover, Perez does not explain how he was

prejudiced by any error in the dates alleged in the indictment. *See State v. Jones*, 188 Ariz. 534, 543-44, 937 P.2d 1182, 1191-92 (App. 1996) (victim's testimony regarding dates of assaults, although "not exactly match[ing] those of the indictment," sufficient to support convictions when, in part, "[a]ny defect in the dates alleged in the indictment . . . could not have prejudiced [the] defense"); *see also State v. Verdugo*, 109 Ariz. 391, 392, 510 P.2d 37, 38 (1973) ("It has been held repeatedly . . . that the precise time of the act is unnecessary to be proven. . . . [It] was not a material ingredient of the crime, unless it deprived the defendant of his defense of alibi."). We therefore conclude that a reasonable jury could have found the charged crimes occurred reasonably near the dates alleged. *See Arredondo*, 155 Ariz. at 316, 746 P.2d at 486.

Sufficiency of the Evidence to Support All Convictions

¶28 Perez also claims there was insufficient evidence of his guilt to support all ten convictions. Again, we will not reverse a conviction for insufficient evidence unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *Arredondo*, 155 Ariz. at 316, 746 P.2d at 486.

¶29 Perez contends that, because there was no physical evidence or witnesses to the sexual assaults other than the victims, the evidence was insufficient to support the convictions. However, the uncorroborated testimony of a victim is sufficient evidence to support a sexual assault conviction. *Verdugo*, 109 Ariz. at 393, 510 P.2d at 39. In his reply, Perez appears to argue that, because the state presented no "sworn statement" or testimony

by a victim, the evidence was insufficient. Perez cites no authority for this proposition. Whether a statement is made under oath or, as here, a victim makes allegations and later recants them only raises a question of credibility. And "[t]he credibility of a witness and the weight and value to be given a witness' testimony are questions exclusively for the jury." *State v. Pieck*, 111 Ariz. 318, 320, 529 P.2d 217, 219 (1974). In any event, C.'s testimony about Perez's conduct with her certainly supports the jury's conclusion as to Count X.

¶30 In support of his argument, Perez relies on *Johnson*, 210 Ariz. 438, ¶ 7, 111 P.3d at 1040, in which we upheld a conviction of attempted sexual assault on a sufficiency of the evidence challenge. In *Johnson*, there was substantial physical evidence, including the defendant's DNA and a knife found on the victim's bed, corroborating the victim's testimony. *Id*. But *Johnson* did not hold that, absent corroboration of the victim's testimony by physical evidence, the conviction was unsupportable; rather, we simply found, given all the evidence, that a rational jury could have found the defendant guilty. Similarly, because A. repeated the allegations of abuse to several witnesses over a substantial period of time, one of which was recorded, thereby allowing the jury to assess credibility, and because the state presented evidence that A. might have changed her story because of her mother's lack of support, there was sufficient evidence for a rational jury to conclude Perez had committed the charged offenses. *See Arredondo*, 155 Ariz. at 316, 746 P.2d at 486.

Ineffective Assistance of Trial Counsel

¶31 Perez lastly contends his trial counsel was ineffective. However, our supreme court has held that "ineffective assistance of counsel claims are to be brought in Rule 32 [Ariz. R. Crim. P., 17 A.R.S.] proceedings. Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). We therefore do not address this claim.

Disposition

¶32 We affirm Perez's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge